U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-, LLC

DATE: JUNE 12, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a healthcare services company, seeks to permanently employ the Beneficiary as a physical therapist in accordance with section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2). It has applied for a labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. *See* 20 C.F.R. § 656.15. Schedule A, Group I is a list of occupations for which the Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified, and available, and that the employment of foreign nationals in such occupations will not adversely affect the wages and working conditions of similarly employed United States workers. *See* 20 C.F.R. § 656.5.

The Director of the Nebraska Service Center denied the petition, concluding that it did not meet the requirements for a labor certification because the notice of the filing of the DOL ETA Form 9089, Application for Permanent Employment Certification, did not comport with the regulations. *See* 20 C.F.R. § 656.10(d) and 20 C.F.R. § 656.15(b)(2).

On appeal, the Petitioner submits a statement and additional evidence, asserting that the petition meets the notice requirements for a Schedule A, Group I labor certification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Under the regulation, a petitioning employer requesting a Schedule A, Group I labor certification must file a Form I-140, Immigrant Petition for Alien Worker, "accompanied by an application for Schedule A designation." 8 C.F.R. § 204.5(d); *see also* 8 C.F.R. § 204.5(a)(2), (k)(4). In addition, the petitioner must establish that it has provided its U.S. workers with notice of the positions it seeks to fill as well as its filing of the ETA Form 9089 certification application. *See* 20 C.F.R. § 656.10(d); 20 C.F.R. § 656.15(b)(2). Specifically, the employer must notify its employees' bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the facility or physical location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The posted notice must be up for at least 10 consecutive business days, and in conspicuous places where the employer's U.S. workers can readily read it on their way to or from their place of employment. 20 C.F.R. § 656.10(d)(1)(ii). In addition, the notice must be published "in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization." *Id.* Moreover, the notice must contain a description of the available positions and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6). A petitioner may satisfy the notice requirements by "providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media" used to distribute the notice. 20 C.F.R. § 656.10(d)(1)(ii). While ETA Form 9089 certification applications are generally filed with DOL under the standard labor certification procedures of 20 C.F.R. § 656.10, ETA Form 9089 certification applications for Schedule A, Group I occupations, along with the accompanying Form I-140 petitions, are submitted to U.S. Citizenship and Immigration Services (USCIS), which assumes the role of the DOL certifying officer. *See* 20 C.F.R. § 656.15(a).

II. ANALYSIS

The Petitioner maintains on appeal that the Director erred in denying the petition without first issuing a request for evidence (RFE), and concluding that the notice provided in support of the petition did not meet the requirements for Schedule A, Group I labor certification. We have reviewed the entire record of proceedings before us, and for the reasons discussed below, we agree with the Director's determinations.

A. USCIS Procedures for Issuing Requests for Evidence

The Director denied the petition without first issuing an RFE. The Petitioner asserts that the denial of the petition in this manner is contrary to the regulation at 8 C.F.R. § 103.2(b)(8). We note that 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part that USCIS "in its discretion may deny the benefit request for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS."

Here, the Director concluded that the submitted initial evidence did not establish eligibility and thus in his discretion denied the petition. It was within his discretion to deny the petition based on insufficient initial evidence without first issuing an RFE. Thus, the Director's denial was not contrary to the regulation. *See* 8 C.F.R. § 103.2(b)(8)(ii).

In addition, the Petitioner asserts on appeal that it need not submit evidence to USCIS confirming it notified its U.S. workers of the positions it seeks to fill or its filing of an ETA Form 9089 certification application, because USCIS did not issue an RFE specifying that such documentation is required. *See* 20 C.F.R. § 656.10(d). It points to the regulation that states: "the employer must give notice of the filing of the [ETA Form 9089 certification application] and be able to document that notice was provided, if requested by the Certifying Officer." 20 C.F.R. § 656.10(d)(1). It maintains that without an RFE, USCIS, as the certifying officer, has not specifically required evidence of notice in this case. The Petitioner's assertion is contrary to USCIS policy, which provides guidance

on the evidence that a petitioning employer must submit in support of all petitions involving a Schedule A, Group I labor certification.[1] Under USCIS policy, a petitioner must demonstrate through documents that it satisfies the notice requirements under 20 C.F.R. § 656.10(d). The Petitioner has not established that USCIS policy is applicable only upon an issuance of an RFE.

B. Schedule A, Group I Notice of Posting

In this case, as there is no bargaining representative, the Petitioner must notify its U.S. workers of the available physical therapist positions and its filing of the ETA Form 9089 certification application by posting notices at the facility or physical location of the intended employment. 20 C.F.R. § 656.10(d)(1)(ii). The Petitioner has not satisfied the notice requirements, because the posted notification does not identify the employer of the job opportunity. In addition, the Petitioner has not specified the place of the intended employment or demonstrated that it posted the notice at all required locations. Further, it did not submit an attestation or documentary evidence verifying its publication of the notice in its in-house media. We therefore agree with the Director that the Petitioner's notice does not meet the regulatory requirements at 20 C.F.R. § 656.10(d) and 20 C.F.R. § 656.15(b).

The Petitioner's posted notice does not identify the employer of the available physical therapist positions. *See* 20 C.F.R. § 656.10(d)(i). On appeal, the Petitioner maintains that the notice directed interested individuals to contact its director and that its name was part of the director's job title, thus identifying the employer of the job opportunity. We disagree, because although the notice specifies the contact person's employer, it does not clarify that the same entity, rather than a different business, is seeking to fill the positions. The Petitioner has not submitted sufficient evidence showing that its U.S. workers reading the notice would realize that the contact person's employer is also the company offering the job opportunity.

Regardless, the Petitioner has not specified the location of the intended employment in the notice. Section H of the ETA Form 9089 reflects that the primary worksite for the physical therapist position offered to the Beneficiary is various "[h]omecare locations in [redacted]" The notice states that there are "multiple openings" for "[p]hysical therapist [positions in] [redacted] NY." However, according to the addendum to DOL Form ETA 9141, Application for Prevailing Wage Determination, the worksite may also be in [redacted] or [redacted] New York. The notice does not mention prospective employment locations in [redacted] or [redacted] New York. In addition, we agree with the Director that the notice, which indicates generally the city and state of the opportunity, does not sufficiently state the facility or physical location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1)(ii).

[1] USCIS Policy Memorandum, HQPRD70/23.12, *AFM Update: Chapter 22: Employment-based Petitions (AD03-01)* 15-18 (Sept. 12, 2006), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/afm_ch22_091206r.pdf (last accessed on May 10, 2017, and incorporated into the record of proceedings).

Moreover, the Petitioner has not demonstrated that it posted the notice at all required locations. A letter from its director, submitted on appeal, indicates that the notice was:

> [P]osted on our premises on March 2, 2015, and removed at the closing of business on March 20, 2015, in the company's break room in the same location as the company's Wage and Hour, Minimum Wage, and Disability Insurance notices. The company does not use in-house media for recruitment.

Under USCIS policy, the Petitioner must post the notice at the location where the Beneficiary "is actually going to be physically employed such as the hospital or other facility where the [B]eneficiary will be directly providing services, and not at the corporate headquarters or other office of the employer."[2] Similarly, DOL has explained that:

> If the employer does not know where the Schedule A employee will be placed, the employer must post the notice at that [*sic*] work-site(s) of all of its current clients, and publish the notice of filing internally using electronic and print media according to the normal procedures used by the employer to notify its employees of employment opportunities in the occupation in question.[3]

According to its statements on appeal, the Petitioner posted notice at its premises, but not at the physical location or facility where the Beneficiary will provide services, or at work-sites of all of its current clients. The notice, ETA Form 9089, and ETA Form 9141 confirm that the physical therapist openings are located at the Petitioner's multiple client work-sites.[4] As such, the Petitioner has not demonstrated that it posted the notice at all required locations. *See* 20 C.F.R. § 656.10(d).

Finally, in addition to the regulatory notice requirements discussed above, USCIS Policy provides the following relevant guidance:

> PERM [DOL's permanent labor certification program] rules also require that the employer publish the notice in all in-house media, whether electronic or print, that the employer normally uses to announce similar positions within the employer's organization. The Form I-140 petition for Schedule A must include the employer's attestation of such in-house publication. The attestation may be, but need not be, provided in the same document as the proof of worksite posting.[5]

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[2] USCIS Policy Memorandum HQPRD70/8.5, *supra*, at 6.

[3] *See* DOL's Frequently Asked Questions and Answers, Notice of Filing, #12 located at https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!176 (last accessed on May 10, 2017, and incorporated into the record of proceedings).

[4] In addition, the Petitioner's website indicates that it employs physical therapists at multiple venues including "Long Term Care, Schools (both Public & Private), Hospitals, Clinics, Outpatient Centers, Private Practices, Residential Group Homes, Home Care and more." *See* http://www. (last accessed on May 10, 2017, and incorporated into the record of proceedings).

[5] USCIS Policy Memorandum HQPRD70/8.5, *supra*, at 6.

On appeal, the Petitioner states that it need not submit an attestation or documentation regarding in-house media because "[t]he company does not use in-house media for recruitment." *See* 20 C.F.R. § 656.10(d)(1)(ii). The record contains insufficient evidence to corroborate this statement. Specifically, its website, which the Petitioner provides in its filings, contains a recruitment section that solicits for interested individuals to seek further information about available physical therapist positions.[6] The Petitioner has not explained why providing information regarding available positions via its company website would not qualify as "in-house media" used for recruitment purposes. Without additional corroboration, the record does not establish that the required notice has been published in the Petitioner's "in-house media . . . in accordance with the normal procedures used for the recruitment of similar positions" in the organization. *See* 20 C.F.R. § 656.10(d); *see also* USCIS Policy Memorandum HQPRD70/8.5, *supra*, at 6.

III. CONCLUSION

The Petitioner has not satisfied the regulatory notice requirements for a Schedule A, Group I labor certification. Its notice does not identify the employer of the available positions or specify the place of the intended employment. In addition, the Petitioner has not demonstrated that it posted the notice at all required locations or published the notice in its in-house media. Accordingly, it has not shown eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of I-, LLC*, ID# 429759 (AAO June 12, 2017)

[6] http://www. (last accessed on May 11, 2017, and incorporated into the record of proceedings).